

REGULATORY IMPACT ASSESSMENT, POLITICAL CONTROL AND THE REGULATORY STATE

Claudio M. Radaelli (*) and Fabrizio De Francesco (**)

(*) Director, Centre for Regulatory Governance, Professor of Political Science and Jean Monnet Chair, University of Exeter, UK.

(**) Research fellow, Centre for Regulatory Governance, PhD candidate, Department of Politics, University of Exeter, UK.

Abstract

In this review paper we bring theories and frameworks to bear on the analysis of regulatory impact assessment (RIA). We present theoretical justifications of why elected officials introduce RIA, drawing on principal-agent explanations, but also showing their limitations and alternative theoretical explanations. We discuss the broader constitutional impact of RIA and review the empirical evidence. We argue that RIA provides an excellent test for theories of political control of the bureaucracy and a litmus test for current academic debates on the nature of the regulatory state. Since empirical research has fallen short of expectations, we conclude with suggestions on how the key research questions can stimulate future research in this field.

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DRAFT – Comments welcome C.Radaelli@ex.ac.uk; F.De-Francesco@exeter.ac.uk
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INTRODUCTION

Regulatory impact assessment has spread throughout the globe, from the USA to Europe and beyond (Wiener, 2006; Jacobs, 2006; Kirkpatrick, Parker & Zhang, 2004; Kirkpatrick & Parker, 2007). Based on systematic consultation, clear criteria for policy choice, and economic analysis of how costs and benefits impact on a wide range of affected parties, this tool has been presented as a component of smart regulation (OECD, 2002). Others have hailed RIA as a tool for transparent, open, and ultimately more democratic regulatory governance in multi-level political systems like the European Union (Commission, 2001).

For political scientists, however, there may be factors more relevant than popularity among policy-makers to stimulate research. So, why should political scientists be interested in RIA? Does RIA feed into the current debate on regulatory governance and if so what does it bring into the academic discussion? In this paper we show that academic interest has been skewed - with the USA being the case that has attracted most of the attention. We define the perimeter of the field, show what has been established and what has to be addressed by future research, and reflect on the different ways in which impact assessment can be used to test theoretical propositions about the political control of bureaucracy and the regulatory state. We bring theories and frameworks to bear on the analysis of impact assessment – thus contributing to more in-depth analysis of this phenomenon.

We start from the basic question of how to explain the decision of political masters to saddle bureaucracies with impact assessment requirements. We show that the adoption of RIA can be justified by different theoretical propositions on the nature of the regulatory state (Section 1). We then focus on the logic of adoption in the specific context of the US. We draw on principal-agent model, but also show its limitations and alternative theories of regulation (Section 2). This leads us to a discussion of the wider constitutional issues raised by

administrative procedure (Section 3). In Section 4 we move from theory to empirical evidence, and report on the main findings and their implications. Section 5 brings together theories and empirical evidence, and airs some questions for the current and future research on this topic.

1. RIA ADOPTION AND THE REGULATORY STATE

The question is simple: why would a government want to adopt RIA? To answer this, one needs a theory of regulation and an analysis of the institutional-administrative context. So the question becomes ‘What kind of regulatory theory would justify the emergence and the adoption of RIA in a given political system?’ And, considering a specific regulatory theory, what type of administrative process one would expect? Finally, what is the relationship between the logic behind adoption and the models of the regulatory state?

Theories of regulation vary in terms of the degree of specification of causal links between theoretical assumptions and logic of introduction of RIA. More work has been done in the area of public choice theory of regulation (see Section 2). On balance, however, scant attention has been dedicated to the linkages between regulation theories and the administrative process wherein RIA is supposed to work – a point lamented by Croley (1998), who refers to the administrative process as ‘the black box’. One point to bear in mind is that theorists who have explained the emergence of RIA have always done so reasoning with the US political system in mind. Within this system, the key features are delegation to regulatory agencies, Presidential oversight, the presence of a special type of administrative law (the reference is to the Administrative Procedure Act, APA), and judicial review of the rulemaking – for a review of the debate on the judicial review of the cost-benefit analysis within the American President oversight see Raven-Hansen (1983). These features should not be taken for granted when we try to explain the adoption of RIA in systems different from the US. For example, there is no judicial review of rulemaking in European political systems (OECD, 2002: 74-5, Rose-Ackerman, 2007), where

APA is just about reason giving requirements rather than a proper rulemaking process as in the American experience. At the EU level, there is an embryonic debate on how the European Court of Justice may refer to RIA (Meuwese, 2007), but nothing more.

With this caveat in mind, let us turn to explanations. The first is based on the delegation chain. The main political dimension of RIA lies with power relations between the principal and the agent in a context in which Congress delegates power to agencies and the President exercises oversight on the federal executive agencies. The second sees RIA as an instrument to pursue broad economic policy goals. This is not necessarily incompatible with the first explanation. For example, once a President manages to use RIA to control federal executive agencies, why shouldn't the President use the same power to steer agencies' rule-making towards de-regulation or more regulation?

A third logic of justification of RIA is in terms of democratic governance. Administrative procedure is used to change the opportunity structure in which actors (the executive, agencies, and the pressure groups, including civil society associations) interact. In particular, the opportunity structure underlying the selection of rules can be tweaked to offer more pluralism (as neo-pluralist notions of the regulatory state have it) or seek to promote civic republican governance. Finally, there is a logic based on 'rational' policy-making. This can be declined in different ways, more often than not the notion is that impact assessment is adopted to produce regulations that increase the net welfare of the community (Arrow, Kenney, Cropper, Eads, & Hahn, 1996). Underlying this notion is the requirement to use economic analysis systematically in rule-formulation, the classic option being cost benefit analysis.

Rationality, however, can also mean legal rationality. Indeed, Heydebrand (2003) adds that there are different legal rationalities. More generally, sometimes 'rationality' is synonymous of independent regulatory decision-making (in which case 'rational' decisions are contrasted with 'political' decisions). In the background of this logic lies the debate on types of rationality in the policy process – reviewed by (Jones, 1999). The various types of logic of adoption

underlying different theories of regulation (often developed in North-America) have connections with the more recent debate on the regulatory state (see table 1).

Table 1 – Logic of adoption and models of the regulatory state

Logic underlying the adoption of RIA	Models of the regulatory state
<ul style="list-style-type: none"> • Political control of bureaucracy (principal-agent models) 	<ul style="list-style-type: none"> • Regulatory state as creation of control capacity and increased reach of public intervention • Symbolic models
<ul style="list-style-type: none"> • Economic outcomes (politico-economic models) 	<ul style="list-style-type: none"> • Politico-economic models of the regulatory state
<ul style="list-style-type: none"> • Changing the opportunity structure of regulatory choice in order to achieve open governance 	<ul style="list-style-type: none"> • Neo-pluralist regulatory state • Civic republican governance
<ul style="list-style-type: none"> • Rational policy-making 	<ul style="list-style-type: none"> • Non-majoritarian regulatory governance

From different perspectives, authors such as Michael Moran and Nicolas Jabko have offered a political interpretation of the regulatory state. Looking at the UK, Moran (2003) has found that the regulatory state is inherently problematic in political terms. It does not draw on Pareto-efficiency, but, at least in the case of the UK, on hyper-modernistic ideas. It triggers the colonization of areas of social life that were previously insulated from political interference and managed like clubs. The advent of democracy has pushed regulation into these areas, but the result has not been democratization. Rather, there has been an extension of political control, constellated by political fiascos rather than efficient solutions.

Jabko (2006; 2004) adds that the EU is another case in which market ideas have been trumped by politics. Political control and regulatory capacity have used market ideas to suit specific goals. There is no doctrinal coherence in the regulatory state (no emergence of Pareto-efficient economics-based decisions) but rather practical coherence (the same coherence that enables the Commission to combine competition policy and cohesion policy to achieve its goals). He argues that:

The process of market-oriented regulatory reform in Europe in the last two decades has entailed a fundamental change in the nature of political power and the conception of the role of the state. But it has *not* meant the emergence of an a-political regulatory state solely devoted to the pursuit of efficiency and completely divorced from a more traditional conception of the state that would stress the pursuit of political power, societal values and distributional goals. (Jabko 2004: 215, emphasis in original)

Following Power (1999), the regulatory state can also be seen as a manifestation of symbolic politics and rituals of verification. In a sense, this is yet another match with the logic of control in theories of regulation, but of a very different, more symbolic type. Given the increasing relational distance between principal and agents, audit procedures replace trust and administrative rule-making replaces informal coordination. RIA is eminently yet another explosion of audit rules, this time applied to the regulatory process in its entirety. If political organizations produce knowledge about the expected impact of policy to increase their legitimacy rather controlling regulation and fostering economic outcome, we would expect policy appraisals tools like RIA to play a role in the symbolic dimension of the regulatory state (Brunsson, 1989).

Moran, Jabko, and, from a different perspective, Power provide two models of the regulatory state that are compatible with the logic of control evidenced by principal-agent theories of regulation. Political control is accompanied by a trend towards more regulation of society and the economy – in any case, political reasons trumpet market ideas when they cannot be jointly achieved. To make expectations about specific economic outcomes (second row in table 1), one has to look at political economy models in which parties in government pursue different economic goals. Drawing on Hibbs (1977), there has been a lot of debate on partisan control of the macro-economy and regulation, as shown inter alia by Garrett (1998). The interface with the discussion about party-political control of the economy is provided by those studies of RIA that have looked at whether executive control is used to steer

agencies' rule-making towards a specific outcome when the Presidency switches, for example from Republicans to Democrats.¹

What about rational policy-making and its connections with models of regulatory governance? Although (Majone, 1989) is critical of synoptic rationality, much of his analysis of the non-majoritarian regulatory state is compatible with notions of Bayesian learning leading to rational policy-making under conditions of uncertainty and bounded rationality (Majone, 1996, 1999). Based on the American literature, his influential argument is that the rise of the regulatory state can be explained by an important ideational shift (the turn from market intervention to efficiency-preserving regulatory policy) exploited by skilful bureaucratic actors, such as the European Commission. Delegation of regulatory power to independent regulatory agencies makes regulatory action more credible than elected regulators, too close to the electoral cycle to produce Pareto-improving choice. Thus, power is transferred to independent regulatory agencies in areas in which distributional matters and values are much less important than efficiency – a point that chimes with the recent theoretical work on politicians and bureaucrats (Alesina & Tabellini, 2007, forthcoming-a, 2007, forthcoming-b). The ensuing mode of decision-making is non-political, or in any case more informed by economic logic under conditions of bounded rationality than political logic. Regulatory legitimacy – this is Majone's normative complement to his positive theory – is eminently a question of procedures. Regulators are credible if they provide reasons for their regulatory choices, support decisions with transparent economic analysis and objective risk analysis, involve stakeholders in processes of consultation, and enable courts to review their decisions.

¹ see Hahn and Dudley (2004), or, for an exploratory comparative study controlling for the impact of parties in office on RIA outcome, (Troeger, Radaelli, & De Francesco, 2007). Recently, (Shapiro, 2007) has argued that the rules that the executive sets for the analysis to be carried out by federal executive agencies would not pass a cost-benefit test. They simply add a sui-generis form of red tape that makes it difficult to introduce new rules. If this is true, one could carry on to submit that RIA requirements foster one specific type of economic outcome, that is, reducing the amount of new regulation.

2. LOOKING FOR THEORETICAL EXPLANATIONS

Bearing in mind these connections between logic of adoption and models of the regulatory state, let us zoom on how theories of regulation explain the adoption of RIA. In public choice theory, the regulatory process is characterized by the presence of regulatory demand and supply. In the regulatory market place, however, information asymmetries, classified by economic theory as moral hazard, adverse selection, and signalling (Macho-Stadler & Perez-Castrillo, 2001) are larger and more expensive to avoid than in classic markets for goods and services. Principal-agent models -- developed to explain how delegation problems are solved -- shed light on the nature of RIA as a type of administrative procedure.

Delegation to agents triggers the problems of bureaucratic and coalitional drifts. The former is a direct consequence of delegation: once power has been delegated, information asymmetries produce agency dominance. The principal can use incentives to react to this state of play, but there are empirical and theoretical reasons why this solution may not work – for a review, see Miller (2005). Agencies, however, can still develop rules in the interests of the principals, if proper administrative procedures enforced by the courts are introduced (McCubbins, Noll & Weingast, 1989). Coalition drift arises out of the fact that agencies may over time produce rules that do not reflect the original deal made by political principals and their most relevant constituencies for support (i.e., the pressure groups that entered the original deal) (Horn & Shepsle, 1989; see Macey, 1992 on how the two problems can be solved simultaneously). Positive political theorists predict that the regulatory process is dominated by organized subgroups, with diffuse collective loss.

Following this theoretical template, administrative procedures are used to exchange information on the demand and the supply of regulation. The design of administrative procedure limits the participation of broader interest groups and ‘facilitates rent-seeking while appearing open and neutral on the surface.’ Croley (1998 note 281) and McCubbins, Noll, and Weingast (1989) have argued that

administrative procedures are a mechanism to exercise political control over regulatory agencies that overcomes the limitations of incentive structure. Administrative procedures reduce the principal-agent slack. They are used 'to enfranchise important constituents in the agency's decision-making, assuring that agencies are responsive to their interest' (McCubbins, Noll, & Weingast, 1987: 244). Moreover, the 'most interesting aspect of procedural controls is that they enable political leaders to assure compliance without specifying, or even necessarily knowing, what substantive outcome is most in their interest' (McCubbins, Noll, & Weingast, 1987:244).

Administrative procedure is effective in several ways. Firstly, it allows interest groups to monitor the agency's decision-making process (fire alarm monitoring is made possible by APA procedures such as notice and comment). Secondly, it 'imposes delay, affording ample time for politicians to intervene before an agency can present them with a *fait accompli*' (McCubbins, Noll, & Weingast, 1989: 481). Finally, by 'stacking the deck' it benefits the political interests represented in the coalition supporting the principal (McCubbins, Noll, & Weingast, 1987: 273-4).

Cost-benefit analysis (CBA) plays a specific role in the context of RIA – as shown by principal-agent models. According to Posner (2001: 1140), CBA is understood as 'a method by which the president, congress, or the judiciary controls agency behavior'. Indeed, CBA minimizes error costs under conditions of information asymmetry. This does not mean that CBA (and by extension RIA) will enhance the quality of regulatory outcomes in term of social welfare. According to Posner, the purpose of requiring agencies to perform CBA is not to ensure that regulations are efficient, but it is to enable elected officials to maintain power over agency regulation. Consequently, the model predicts that introduction of CBA will increase the amount of regulation as well as the amount of inefficient regulation.

Concluding on principal-agent models, RIA is a component of the administrative procedure that solves the principal's problem of controlling bureaucracies. Its position with the family of control systems is peculiar. Whilst

some instruments operate either *ex ante* (e.g., statutes and appointments) or *ex post* (e.g., judicial review of agency's rule-making), RIA provides on-going control. It operates whilst rules are being formulated and regulatory options are assessed.

Accordingly, the major interest of political scientists about RIA is that it provides an excellent platform for testing theories of political control of the bureaucracy. In its standard formulation, this secures congressional dominance, even in the absence of incentives and specific monitoring in the form of hearings or monitoring inputs.

Some questions arise even within the principal-agent theory territory – we shall move to more 'external' critiques later on. For a start, there are multiple principals for an agency. Miller (2005) shows how models have to be modified when both the Presidency and Congress compete for the political control of bureaucracy – and consequently the conclusions about congressional dominance become less neat. In turn, the President uses political appointees at the top of agencies to minimize the problem of bureaucratic autonomy. Hammond and Knott (1999) show formally how political appointees can be useful to the principal's interests by identifying preferences or by framing the policy issues.

The point about preferences is important: in real-world rule-making, one of the problems encountered by agencies is that the preferences of the interest groups and those of the political principals are less than clear. Kerwin (2003) insists on this point in the conclusions of his book, and most qualitative analyses of RIA and accounts of practitioners suggest that one of the major difficulties in impact assessment is the identification of 'who wants what', that is, the identification of preferences, at an early stage, when options are fleshed out. Models of rule-making coalitions show the complexity of preferences constellations across principals and clients within large coalitions (Waterman & Meier, 1998). And in any case, perhaps the White House or Congress do not really want to exercise control of the bureaucracy all the time – one can reason

that for the President it is efficient to let the agent figure out what the diverse positions are and how they can be accommodated (Kerwin, 2003: 275-276).

Further, Spence (1997) does not believe that legislators can really anticipate the consequences of administrative procedure. The latter is used because interest groups perceive it as fair, not because it yields a certain outcome. In the end – Spence reasons – administrative procedure is more a matter of legitimacy than a mechanism of political control of the bureaucracy.

Another consideration is that a theory of rule-making is too static without a theory of negotiation (Kerwin, 2003: 278-279). Under conditions of multiple principals, problematic identification of preferences, and uncertainty about how the courts will ‘close’ the incomplete contract between agent and principal, negotiation plays a fundamental role. Indeed, data and the strategic use of knowledge - Kerwin (2003: 279) notes – represent the informational component of the negotiation game.

Finally, the standard formulation of principal-agent theorizing about administrative procedure does not tell us how the agency responds. Here we need a model of bureaucracy. Drawing on the literature surveyed by (Kerwin, 2003), the agency can be internally fractured by a dimension of conflict pitching the bureaucrats against the political appointees. Or, alternatively, within the agency there may be different Downsian types of civil servant (the climber, the conserver, the advocate, the zealot, and the state-person) who approach RIA differently (Downs, 1967). Findings produced outside principal-agent model make the intra-agency reality quite interesting even though difficult to capture. In his survey, William West has shown the presence of professional differences within agencies: scientific/technical personnel responds to CBA less favorably than personnel trained in policy analysis. The question is not simply one of training, but rather one of different viewpoints on the nature of the rule-making process (West, 1988). Ayers and Braithwaite (1992) explain that the same individual behaves rationally or morally depending on the changing characteristics of the environment and the specific regulatory interaction at stake – in a sense, this chimes with the ‘mixed motives’ bureaucrats of *Inside Bureaucracy*. McGarity

(1991) finds similar conflicts within agencies, but he also draw attention to how decision-making is organized internally. Agencies can rely on the following forms of organization: team, hierarchy, outside advisor, adversary, and hybrid models. This observation on internal organization and professional background hints at a possible fruitful combination of formal models of rule-making with management theories – for an effort in this direction see Hammond & Knott (1999).

One can of course challenge these classic arguments for the adoption of RIA on the basis of other theories of politics and regulation. Let us consider two alternatives mentioned in debate, the neo-pluralism and civic republican models. In the neo-pluralist theory, the perspective switches from the executive control of the agencies to politics. RIA (and more generally administrative procedure) will therefore be adopted to produce equal opportunities to pressure groups (see Arnold (1987) on the impact of the environmental impact assessment and the Freedom of Information Act requirements on the administrative state). Granted that regulatory choice is about collecting information from different sources and balancing different values, RIA can be used to ensure that all the major interests affected compete in a level-playing field. Transparency and open processes of rule-making are necessary conditions for neo-pluralist politics to operate optimally. Andrews (1984: 80) considers that '[t]he real issues in social regulation are how to ensure appropriate balancing of multiple objectives in regulatory decisions, how to ensure selection of the best regulatory instruments to achieve that balance, and who to coordinate and balance the aggregate effects of many regulations'. Normatively, Andrews proposes to 'explore the potential of explicit negotiation and consensus-building procedures in developing regulations as an alternative to the artificial formalism of RIA' (Andrews, 1984: 81). In this connection, authors such as Grubb, Whittington, and Humpries (1984:158) have reasoned that Executive Order 12291 on RIA can increase participation and balanced decision-making:

'[t]he long-run success of EO 12291 depends on the participation of various groups and organizations: of OMB (or some other centralized office) to give some direction and coordination to the

enterprise; of the economists and other who believe in regulatory analysis that cannot easily be swept away by purely political concerns; and of various publics outside government to scrutinize agency decision making and ensure that public values are not swept aside by a wave of misplaced utilitarianism. Otherwise, it will take its place as another in a long series of failed efforts at regulatory reform.’ (Grubb, Whittington & Humphries, 1984: 159)

On balance, RIA provides an information-rich environment and a ‘two-way exchange of information’ about preferences between competing groups and regulators. The problem with this approach is that the explanation of why the executive adopts RIA is not very clear – one must assume that elected officials wants to change the opportunity structure to achieve conditions that approximate the ideal of neo-pluralist ideal. The government – one can carry on with the explanation - may want to do this under pressure from the interests group themselves.

The civic republican theory rejects the fundamental idea of preference aggregation of the previous three theories, rooted in methodological individualism (Ayers & Braithwaite, 1992). Under proper conditions, actors are able to pursue their economic interest but also the broader community interest (Croley, 1998: 78). Drawing on Ayers and Braithwaite (1992), this model of the regulatory state provides a direct participatory role to public interest groups, civil society organizations, and citizens. It therefore opens up networks of regulators and strong economic pressure groups typical of neo-corporatist arrangements. It goes beyond pluralism: Weaker groups and the community as a whole are deliberately empowered. Instead of technocratic decision-making, this model argues for fully political and participatory policy-making styles. Authors such as Bartle (2006) have benchmarked the better regulation activity of EU institutions with notions drawn from the civic republican model.

Under the civic republican theory, Croley expects RIA to provide ‘an opportunity for public-spirited dialogue and deliberation about regulatory priorities’ and provide ‘real opportunities for participation by many groups.’ (Croley, 1998: 102). At a more general level, Ayers and Braithwaite show how

regulation can be designed starting from the general principles of this theory. A civic republican RIA will therefore aim at making the community stronger. Regulatory choice will be less about measuring the costs and benefits of regulation, less about making market deals, and would look more like deliberation (Ayers & Braithwaite, 1992: 17). The key question becomes ‘under what conditions does a form of appraisal like RIA foster deliberation and communicative rationality?’ So the real dependent variable is not the adoption of RIA and what difference does RIA make to executive-agency relations (on these issues there is no valuable insight offered by civic republicanism), but the impact of RIA on actors and administrative law (and sometimes governance performance).

To illustrate, Judith Petts (2003) analyses the integration of environmental impact assessment into a deliberative democracy framework. She concludes that ‘environmental assessment still largely proceeds *in advance* of discussion with the public rather than *through* discussion with them.’ (Petts, 2003: 269, emphasis in original) Bronwen Morgan (2003) is concerned with meta-regulation, defined as ‘institutionalized procedures of regulatory reform that rely significantly on economic rationality’ and the emergence of a ‘technocratic citizenship’ that ‘has the effect of marginalizing the active creation of community’. Thus,

‘technocratic citizenship under the aegis of economic rationality is not conducive to a policy environment that generates structural power at the broader community level. It provides an arena for active deliberation and participation only at a devolved and disaggregated level, at the level where sector-specific actors with highly technical sector-specific knowledge can shape the intricacy and details only of particular policy sector under review. Social citizenship, however, necessitates decisions about *the overall trade-offs* between the costs and benefits of multiple policy sectors.’ (Morgan, 2003: 224, emphasis in the original)

Finally, one can explain the logic of adoption in terms of rationality. The term is ambiguous – we have already mentioned that it can mean different things. If rationality means efficient decisions, for example by using CBA, this still begs the

question why would a government want to increase the efficiency of the regulatory process? This is where – as mentioned - the non-majoritarian regulatory state portrayed by Majone offers an explanation, based on credibility, the separation between regulatory policy and other policy types, and procedural legitimacy. The question is where, in a political system, one can find analytical requirements that are not overwhelmed by political control. Looking at the experience of the US, Shapiro (2005) notes a contradiction in the role of the Office for Management and Budget. On the one hand, this body is supposed to preserve rationality in the regulatory process by using CBA. On the other, this analytical role is overshadowed by the executive control of the agencies. So – he concludes – one cannot have both analytical functions and political control, as the latter always trumps economics. The case studies produced by McGarity (1991) lead to the same conclusion. However, a classic objection is that the President, unlike individual members of Congress, is elected by the whole nation and therefore will be careful about the broad costs and benefits affecting all constituencies. Hence the President will have an interest in the economic evaluation of regulations (Harter, 1987: 566-9; Kagan, 2001).² Indeed, Croley (2003) finds that the style in which OIRA reviews proposed regulations is ‘technocratic’ – by this he means that the overall approach is technical (as opposed to political) and that the personnel in charge of review is consistent across political parties and administrations.

If, instead, rationality concerns hypotheses about the synoptic nature of the policy process, RIA becomes an instrument that provides root and branch information on the consequences of different regulatory options. The idea is that a unitary decision-maker needs information about the state of the world before designing regulation. Through RIA, the regulator considers all the major implications of all feasible alternatives. This approach does not say much about the logic of adoption. At a general level, it is an empirically and normatively inadequate perspective on policy appraisals, as shown by Owens, Rayner, and Bina (2004). Specifically on RIA, the model does not account for the presence of

² We are grateful to Professor Jonathan Wiener for having reminded us of this objection.

several actors (the President, Congress, the bureaucracy, the pressure groups and the courts) with different preferences – for example the judges may care more about respect for legal texts and precedents rather than having one-dimensional policy preferences (Rose-Ackerman, 2007). Different preferences – we argue drawing on McGarity’s case studies (1991) – in a world of bounded rationality mean that RIA is not used to secure information, but to activate different problem definitions and categorizations, e.g. between the engineers and the economists within regulatory agencies. Sunstein, Kahneman, Schkade and Ritov (2002) argue that regulators tend to focus on one dimension at a time due to their cognitive limitations, i.e., category bound thinking. Yet another manifestation of rationality that deviates from the synoptic template.

Pildes and Sunstein (1995) observe that there are three problems in the use of CBA and ‘rational economic analysis’ in the regulatory process: the conflict between expert and lay value systems; the incommensurability of some benefits and costs that can only be compared qualitatively; and the relevance of an ‘expressive dimension’ of regulatory policy. This expressive dimension refers to the political and social values such as political legitimacy, stability, and fairness that are impossible to capture through CBA (Pildes and Sunstein, 1995: 232-33). The authors conclude that a feasible solution is to split the RIA process in two stages. The first stage should quantify regulatory costs and benefits - disaggregating benefits and costs and how they are distributed over various groups and interests (Pildes and Sunstein, 1995: 127). The second stage should take into account differences between expert and lay value frameworks, concerns for equity, the expressive dimensions of the choice, and other relevant values not subject to the cost-benefit approach. According to Pildes and Sunstein (1995: 127), this structured analysis may promote ‘citizen evaluation of regulatory alternatives’ and increase the rationality of the process without promoting technocratic attitudes.

Boswell (2006) goes back to Brunsson’s argument mentioned earlier on about symbolic uses of rationality. She adds that bounded rationality in political organizations that do not control the enforcement and implementation of their

policies fuels demand for knowledge. However, knowledge is sought to create legitimacy for decisions, not to shape concrete action in the world of policy implementation. Concluding on this point, bounded rationality can have different effects, and, depending on intervening variables concerning the type of organization, can explain a symbolic use of RIA miles away from the benchmark of efficient and optimal decision-making.

3. POLITICAL CONTROL AND THE CONSTITUTIONAL ORDER

On balance, public choice principal-agent modeling offers an analytical explanation of the reasons behind the introduction of RIA, and explains the role performed by administrative procedure. At least it is a useful benchmark. In terms of constitutional balance, the initial idea of administrative performance as fire alarm was introduced to explain how Congress controls bureaucracy, but most of the empirical literature on RIA is on White House control of rule-making in federal executive agencies. So, even assuming that there is control of elected officials on bureaucracies, the constitutional implications differ to a large extent depending on who is in control of agencies.

Be that as it may, the value of this theory beyond the USA has not been assessed. In Europe, for example, RIA is usually used by the prime minister office to control the process of rule formulation in governmental departments. True, there are delegation problems here, and issues of bureaucratic and coalitional drift as well. But the institutional context is different. In Westminster systems, the prime minister and the ministers in charge of different departments belong to the same political party. In other systems, the prime ministers can draw on RIA to coordinate or control ministers from other political parties within the same governing coalition. The role of parliament varies markedly across countries. The dichotomy authority-liberty is fundamental in the administrative systems of countries like France and Italy. There is no intent to use administrative procedure to legitimate pluralism or deliberation or to tame the

Leviathan. In short, in continental Europe at least, there is more Montesquieu (with his separation of power doctrine) than Rousseau-Tocqueville - and certainly not Buchanan.³

American administrative lawyers have discussed the constitutionality and legality of the presidential control over regulatory agencies. For instance, Shane (1995) has argued that the Reagan and Bush administrations' centralized review of regulatory policy was consistent with the constitutional separation of powers (Shane, 1995: 164). The issue is whether there is justification for a presidential order on the rulemaking process. DeMuth and Ginsburg (1986) note that:

'Just as the growth of direct federal spending led to presidential oversight of agency budgets in 1921, and just as the growth of legislation led to presidential oversight of agency positions on legislation in 1940, so the growth of regulation led to presidential oversight of the rulemaking process in the 1970s. And as long as administrative regulation remains the expansive and powerful method of governance that it is today, no president can refrain from controlling it if he wishes to advance his policies.' (DeMuth and Ginsburg, 1986: 1079-80)

Morrison (1986), on the other hand, assesses negatively the centralization of regulatory policy. The main criticism is about the misuse of 'the system of OMB control to frustrate or dismantle the very regulatory scheme enacted by Congress and reaffirmed over the Administration's legislative effort' (Morrison, 1986: 1063). 'At the best, OMB's second-guessing of the substance of agency decisions is an unnecessary overlay that produces no benefit and imposes enormous costs on the taxpayers by increasing the cost of governing; at the worst, it fundamentally undermines the basic principles of fairness and agency expertise on which the rulemaking process is founded.' (Morrison, 1986: 1071)

This leads to the wider implications of RIA on democracy and institutional balance (Cooper and West, 1988; Rosenbloom, 2000, and, for the EU Meuwese, 2007). Indeed, RIA impacts on 'the division of power between the Congress and the President in controlling the decision making; the objectivity and neutrality of

³ We wish to thank Professor Alessandro Natalini for this observation.

the administration; and the role of administrative procedure and courts' (Cooper and West, 1988: 864-5). Cooper and West find that OMB review has increased the centralization and politicization of the rulemaking, exasperating the negative effects on democratic governance of the politics/administration dichotomy. In the American political system – they argue - the public interest emerges out of a process of decision making, so 'each branch must then retain sufficient power to play an influential policy role in both the legislative and administrative processes' (Cooper and West, 1988: 885).

Finally, the constitutional dimensions of RIA stems from the concept of rationality. In a broad, constitutional non-economic sense, rationality can fit in with the doctrine of objectivity (Cooper & West, 1988). Process rationality is indeed legal governance - Heydebrand (2003) argues. This means that instruments such as RIA are introduced to guarantee standards of legal governance, in the context of the wider effort to retrofit the administrative state to the constitutional essence of the state. Rosenbloom (2000) explains how retrofitting embodies two dimensions, that is congressional and judicial attempts to rein in control instruments and, ultimately, power from administrative agencies. In the same vein, West (1983) and Freedman (1978) regard administrative requirements and administrative justice as a means to legitimate regulatory agencies.

4. EMPIRICAL ANALYSIS AND EVALUATION

Does RIA work, and if so to the benefit of whom? One critical issue is to define success. Another is to categorize and measure change – this is a less normative option in that we are not interested in defining success, but simply in the measurement of changes brought about by impact assessment. A third tricky issue is to cope with counterfactuals: would the change have taken place in any case without RIA? As Coglianese neatly puts it, empirical analyses have 'to determine the costs and benefits of regulatory decisions made in the absence of these requirements, and to compare them with the costs and benefits of

regulations made under conditions where economic analysis requirements are imposed' (Coglianese, 2002: 1115). A classic method for the evaluation of changes brought about by RIA is the observational study. There are two types of observational study: longitudinal and cross-sectional (Coglianese, 2002). A longitudinal study compares outcomes (in this case regulatory outcome) of administrative procedures over time; a cross-sectional study compares regulatory outcomes in the same period between one group of countries operating under the procedure and one group of countries that does not.

4.1 Longitudinal-quantitative studies

Several economists based in the US have carried out longitudinal and quantitative empirical studies. The first group of quantitative studies deals with the accuracy of the cost and benefit estimates. Morgenstern, Pizer and Shih (1998; 2001) assess the relationship between costs reported in RIAs and the actual economic costs. They conclude that generally regulatory costs are overestimated. The same conclusion has been drawn by Harrington, Morgenstern and Nelson (2000). They compare the ex ante cost predictions made by OSHA and EPA in twenty-five rule-making with ex post findings made by independent experts. In particular, they rely on previous works conducted, mainly by the US Congress Office of Technology Assessment (OTA, 1995)⁴ and by Goodstein and Hodges (1997), and discussions with more than 50 environmental experts. Harrington and his associates argue that cost overestimation is essentially due to the lack of consideration of 'unanticipated use of new technology' (Harrington, Morgenstern and Nelson, 2000: 314). A literature review by Hahn, however, concludes that costs and benefits are poorly estimated, 'but it is not clear if there are systematic biases' (Hahn, 2007 Forthcoming) .

Pizer and Kopp (2003) look at the accuracy of the cumulative impact of environmental regulations. They conclude that accurate analysis of the social

⁴ OTA 'assembled data on the nature of affected industries' actual adjustment to the compliance provisions and examined the accuracy of the rulemaking estimates (vis-à-vis predominant control measures adopted, compliance costs, and other economic impacts) against these post-promulgation outcomes.' (OTA, 1995: 16)

cost of environmental regulation requires sophisticated welfare economics analyses. Indeed, at the level of firms surveys and engineering studies could both under- and overestimate compliance costs; while case studies, econometric analyses, and retrospective analysis remain inconclusive, even if unbiased. At the economy-wide level, one should also consider tax distortions and the broader social costs – these are outside the scope of ordinary policy analysts and RIA environmental economists.

Another group of quantitative studies has assessed the soundness of economic analyses through scorecards and checklists. Both tools evaluate the quality of ex-ante economic analyses. Scorecards provide measures of the overall impact of different regulations, relying on economic performance indicators such as costs, benefits, lives or life-years saved, cost-effectiveness, etc (Hahn, 2005). Checklists are a collection of quality assurance measures (generally expressed in Y/N format). Hahn and associates have developed checklists of USA RIAs and more recently comparative checklists.⁵ Checklists have been extensively used also to assess ex post the quality of the European Commission's impact assessment (Institute for European Environmental Policy IEEP, 2004; Lee & Kirkpatrick, 2004; Opoku & Jordan, 2004; Vibert, 2004, 2005). International organizations and audit offices make use of scorecards and checklists to evaluate ex ante economic analysis of rules (GAO, 2005; NAO, 2004; OECD, 1995). There are also specific scorecards on health and safety regulatory programs - (Hahn, 1996, 2000, 2005; Morrall, 1986, 2003; Tengs et al., 1995). The use of scorecards to assess the quality of RIAs has been questioned by some American lawyers (Heinzerling, 1998, 2002; Parker, 2000). Parker observes that scorecards disregard un-quantified costs and benefits, neglect distributive impacts and do not disclose the true level of uncertainty (Parker, 2000: 1381-2). Additionally, RIA is, in most countries, selective. Governments perform RIA on a selected number of proposed regulations. To

⁵ See Hahn, 1999; 2004; Hahn, Burnett, Chan, Mader, & Moyle, 2000; Cecot, Hahn, & Renda, 2007.

infer total costs and benefits introduced by new regulation via estimates contained in ex-ante analysis is wrong.

Coglianesse has exposed the limitations of the research questions behind the existing longitudinal-quantitative empirical studies on the accuracy of economic analysis by observing that:

'Even assuming that economic analyses conducted by agencies were always thorough and accurate, it would remain to be determined whether they had an impact on the types of decisions made by regulatory agencies. ... The appropriate empirical test is whether decision made under a requirement for economic analysis turn out to be less inefficient overall than decisions made without such a requirement.' (Coglianese, 2002: 1122)

With this consideration in mind, and being aware of the lack of counterfactuals, let us turn to several quantitative studies on the overall impact of RIA (as process) on the final regulatory outcomes. As mentioned, Croley (2003) has provided a thorough assessment of Presidential review of rule-making. Specifically, he has considered correlations between the following: the type of rule and the likelihood of change; the type of interest group and the likelihood of change; the type of agency and the likelihood of change; the type of agency and the likelihood of an OIRA meeting. He finds significant correlation between rule stage, type of rule significance, and written submissions, on the one hand, and the frequency with which submitted rules were changed, on the other. All things considered – he concludes - OIRA rulemaking review is a positive development in administrative governance.

Drawing on 1986 Morrall's data on final and rejected regulation (partially reviewed to accommodate some of the Heinzerling's critiques), Farrow (2000) has assessed whether OMB review has changed the probability of rejection of high-cost-per-life-saved regulation. He concludes that other variables (the type of regulation - cancer or more in general health regulation - and the budget of trade-groups opposing the regulation) predict the probability of rejection of ineffective regulation better than the cost-per-life-saved variable. This seems to corroborate

the public choice theorists' understanding of RIA – as opposed to the 'rational policy-making' rationales previously discussed.

Among the statistical studies of EPA decisions regarding pesticide use and water quality regulation. Regarding pesticide regulation, Cropper et al. (1992: 193-4) suggest that the EPA is fully capable of weighing benefits and costs when regulating environmental hazards, even if the cost-per-life saved (35 million of dollars) is considered too high. Magat, Krupnick, and Harrington (1986) look at the role of economic analysis in regulatory design. They examine how a variety of variables (estimated of compliance costs, employment effects, plant closing effect, and final product prices as well as the quality of EPA staff and the economic analysis) affect the stringency of pollution standards. The latter, the dependent variable, is measured at three different points of time: the initial phase of the economic analysis, the EPA's initial notice, and the final rule. They conclude that the most profitable industries generally secure weaker standards and that the presence of high-quality staff in a regulatory agency leads to more stringent standards.

Finally, what about the impact of RIA on the behavior of pressure groups and the regulators themselves (the latter to be ascertained via surveys)? Recent empirical analyses have been conducted by Furlong and Kerwin (2005) and Yackee (2006). The first study – based on an interest group survey – reports that lobby groups consider their participation in the rulemaking essential if they are to influence the decision making. Interest groups seem to be able to discern which among several methods of participation is the most effective in achieving congenial regulatory outcome. The second study looks at the correlation between public comments to forty regulations and the direct influence of interest groups. The results show that regulatory agencies change their initial proposal to accommodate interest groups' preferences – yet another case in which public choice understandings of RIA are supported by empirical evidence.

Turning to independent audit offices, the General Accounting Office GAO (1998) has interviewed economic analysts on the use of economics in the regulatory making process and found high variance among the 20 case studies -

on complying with OMB best practice. Similar survey-based findings have been reported by the UK National Audit Office in his 2006 report (NAO, 2006), showing how economic analysis has a differential impact in different departments.

4.2 Longitudinal-qualitative studies

A strand of empirical-qualitative literature looks at RIA in the US, UK, and the European Union. This literature is particularly useful in detecting changes over the medium-long term, as its research question is often the evolution of the politics of RIA. Andrew (1984), Fuchs (1988), McGarity (1991), and Sunstein (1996) trace the development of RIA from its early days to President Reagan. Pildes and Sunstein (1996) compare the President Clinton's executive order with the previous Bush's executive order. Hahn and Litan (2004) account the recent changes made by President George W. Bush. These studies provide ample evidence of how different administrations have shaped and re-tuned the design of RIA to reflect their preferences, although this does not necessarily mean that the political principals have obtained what they were looking for. In a fascinating medium-term study, McGarity (1991) portrays a kind of two-step 'game', between the President and the agencies, and between different cultures within agencies themselves. Along the same line, Cook (1988), assessing the EPA administrative changes enacted by Nixon, Ford and Carter, refers to a 'divided bureaucracy'. The division is due to the dual and conflicting objectives of the principals controlling EPA: the White House cares about economic efficiency in reducing pollution; the Congress want to make progress in resolving pollution problems.

According to Cook (1988: 133) 'the fundamental ideas of the reform movement have etched their mark on EPA regulatory policy, organizational structure, and the internal decision-making processes of the agency'. Nevertheless, Cook argues that RIA reformers disregarded the ethos, history, ideology, and character of the agency (Cook, 1988: 134).

Relying on previous quantitative empirical studies, Farrow and Toman (1998) have reached the conclusion that the actual regulatory review has a 'little impact' on regulatory outcome since the lack of accountability of regulatory

agencies (for similar conclusions in an early study, see Crandall, (1984). Cooper & West (1988) contest the argument that OMB review has had a minimal impact: 'In general, Executive Order 12291 has been an effective means of identifying, evaluating, and influencing those agency policies most important to the President and his key constituencies.'

Beyond the question of the magnitude of the impact on the regulatory process and outcome, and considering a more organizational and political framework, RIA has sometimes enabled agencies to look at rule formulation in new and sometimes often creative ways – McGarity (1991: 157, 308) concludes – but there is the danger of promoting the regulatory economists' hidden policy agendas 'behind a false veneer of objectivity'. Cook again agrees with McGarity's interpretation: 'Despite the best efforts of some the brightest policy scholars to make policy analysis an objective science, it is still easily molded to fit particular views of the world' (Cook, 1988: 138). The problem – we observe – is not RIA per se, but, as McGarity argues throughout his book, whether it is used in a fair, balanced way to produce high quality regulation (and not simply to create obstacles to the formulation of new rules). From the same perspective, but using a different theoretical approach, Taylor (1984) uses the 'science model' to assess the quality of environmental impact assessment in two federal agencies: the Forest Service and the Army Corps of Engineers.

There is also a problem in terms of the status of economic analysis within RIA, specifically CBA - see Adler and Posner (2001). CBA has been criticized for failing to distinguish between the consumer and the citizen, for prioritizing the valuation criteria of the analyst over other ethical and political preferences that should matter in democratic political systems, for biasing participation, and finally for being intrinsically un-constitutional and even incoherent - empirical studies show that willingness to pay and willingness to sell are very different, yet only the former is included in CBA. In response to these criticisms, Hahn (2005) has presented the most articulated defense of the legitimacy of the economic analysis of regulation. In an early article, West (1983: 332) attacked the presentation in technical language of political choices by arguing that:

‘the integrity and the accountability of policy making suffer to the extent that political issues become disguised as technical ones. The administrative process is removed from the public and its elected representatives as the bases for decisions become less straightforward and less comprehensible to all but lawyers, economists, and other specialized groups.’

Questions of accountability and legitimacy can be better addressed by considering the institutional context of a specific country. On the early UK experience, Froud et al (1998) have exposed the conceptual and political limitations of compliance cost assessment. Their view is quite pessimistic: there is no reasonable conceptual foundation for a RIA that ignores the benefit side of the regulatory equation and targets only one constituency – in this case, the business community.

Since this study was published, RIA has changed considerably in the UK, possibly in relation to a political pendulum that has moved from de-regulation to regulatory quality, and most recently back to the reduction of administrative burdens and, perhaps, de-regulation (Dodds, 2006). Baldwin (2005) charts the long-term development of the ‘better regulation agenda’ in the UK and the European Union. He is very skeptical about the possibility that RIA may be bringing about smart regulation. By contrast, RIA hinders regulatory craft and intelligent regulatory designs based on different regulatory techniques applied simultaneously because RIA can only assess one technique against the other. Once adopted, a regulation that has gone through a laborious RIA is not likely to be revised – given the considerable administrative fatigue in collating and setting the RIA ‘numbers’. In this sense, RIA produces ‘ossification’, a term coined by McGarity (1992). In another study based on Britain, Black (2005) shows that risk appraisal increases a false sense of certainty in departments: uncertainty seems to disappear when a number is attached to it. This leads to less than optimal risk regulation - and inefficient behavior of departments when they encounter real risks.

Beyond USA and UK, few papers have addressed the impact of RIA on the quality of decision making and regulatory outcome. A Canadian study has established correlation between levels of commitment (measured via the allocation of resources, the visibility of the government's regulatory policy, guidance and training) and the effectiveness of the RIA process. Interestingly, this report measures the regulators' commitment throughout the whole process, including both economic analysis and consultation – and finds that consultation received more commitment than CBA (Regulatory Consulting Group Inc. and Delphi Group, 2000). Kevin Guerin (2003: 17-8) gauges the incentives used in New Zealand, specifically 'rules which align the goals of the political and bureaucratic agents with those of the political entity' and argues for a set of internal and external control mechanisms such as, for instance, feedback on departmental performance, formal evaluation of RIA, and greater transparency to the public via mandatory disclosure. La Spina (2002) describes the introduction of RIA in Italy as a process of diffusion (via the OECD) of regulatory ideas, implemented at home by communities of advisors close to the Minister. His analysis shows that without real 'domestic demand' for RIA, adoption via international diffusion processes does not lead to institutionalization.

4.3 Cross-sectional studies and matched comparisons

Since the adoption of the 1995 OECD ministerial recommendations on regulatory reform, the Paris-based organization has published reports on the adoption, diffusion, and evaluation of RIA systems (OECD, 1997b, 2002, 2004, and there are 25 country by country regulatory reviews). Obviously, the OECD is interested in the transfer of best practice in RIA (OECD, 1997a) and more specifically quality assurance mechanisms (OECD, 2004). Several databases have been set up to collect cross-national information on RIA (RIA inventory, Indicators of product market regulation). Argy and Johnson (2003) have used OECD best-practice to assess the Australian record on regulatory quality.

As mentioned with reference to the Italian case, an interesting topic in comparative research is the diffusion of RIA. (Radaelli, 2005) has shown that there is diffusion of RIA discourse but no convergence on RIA practice. RIA systems across the OECD differ in terms of their logic (controlling agencies or controlling departments, steering regulatory governance in prime ministerial systems or in coalition governments with a strong parliament), the dominant stakeholders, the main political purpose (de-regulation, regulatory quality, international competitiveness, simplification), and the models of governance pursued by regulatory reformers. Because mimicry and emulation play a role in the diffusion of RIA discourse, in diffusion studies one cannot take for granted rationalistic explanations for the adoption of RIA (Radaelli, 2005: 925).

Hahn and Litan (2005) draw on Radaelli's data and compare quality assurance and the role of economic analysis in Europe and the USA. They find a stark contrast and make recommendations for more economic analysis in the RIAs conducted by the European Commission . In a similar vein, Lutter (2001) draws his own lessons for the European Commission by looking at the American experience.

5. CONCLUSIONS AND SUGGESTIONS FOR FUTURE RESEARCH

Some years ago, Thomas McGarity (1991: 303) observed that 'regulatory analysis is currently in a state of awkward adolescence. It has emerged from its infancy, but it has not yet matured'. In 2006, a consultant (formerly head of the OECD regulatory reform program) defined RIA as 'a global norm' (Jacobs, 2006: 5). Although RIA may have well emerged from its infancy, the academic literature is still looking for the most perceptive research questions – in this sense, it is still in a state of adolescence, although not necessarily awkward.

For political scientists, RIA offers a formidable opportunity to test theories of political control of the bureaucracy. We can look at RIA to get deeper insights into a key debate, originated by Max Weber, between theorists of bureaucratic dominance like Lowi and Niskanen, and theorists of political control inspired by

Weingast's seminal articles on principal-agent models applied to US regulatory politics (Weingast & Moran, 1983; Weingast, 1984). Rational choice theorists are only one of the natural academic constituencies of RIA. The other is made up of scholars who are broadly interested in developing our theoretical and constitutional understanding of the regulatory state. For these scholars, RIA is a potentially excellent litmus test for the various theoretical propositions put forward recently about the nature of the regulatory state in comparative perspective.

The state of the art is not quite up to these expectations. Most of the studies are based on the USA experience, and most of them are not longitudinal. It is difficult to find theory-grounded articles on countries such as Canada and Australia, although these countries have a considerable experience of impact assessment. There is a handful of papers on the UK, almost nothing on individual European countries, and something on developing countries (Kirkpatrick et al., 2004). As noted, diffusion studies and systematic comparisons are almost absent.

This raises the challenge of working in a comparative mode, with suitable research questions on (a) the process of diffusion, (b) the role of political institutions, and (c) the impact of RIA. Research questions falling in category (a) could usefully contrast rational-choice explanations of the diffusion of RIA (e.g., testing across nations the hypothesis that RIA is used to increase central political control on the regulator versus the hypothesis of mimicry, emulation and isomorphism). In category (b), RIA becomes a dependent variable, and more work should be done on what specific features of the institutional context have what type of impacts on RIA. As for category (c), the research questions are whether RIA (this time as independent variable) has economic, administrative or political impacts, in the short or long-term, as shown in table 2.

In this paper, have been eminently concerned with the administrative and political impact – one important question being the relationship with models of the regulatory state. Cells 1 and 4 are more suitable for the economic analysis of RIA. The administrative impact covers issues of administrative capacity - in the short term, RIA requirements raise the issue whether an administration has the

administrative capacity to deal with the economic analysis of regulation (Schout & Jordan, 2007). The implementation of RIA over a fairly long period of time should show its impact of the types of civil servants mentioned by Downs, West, and McGarity. Cell 5 also mentions the long-term relationship between administrative procedure and RIA. No question has been raised in the European literature on how administrative law shapes RIA and viceversa – an aspect well developed in the USA (see Section 3). The political impact brings us into cells 3 and 6, and to major governance-constitutional issues at the core of the academic discussion on regulatory governance.

Table 2 – RIA impacts

	Economic	Administrative	Political – Governance
Short term	<p>Cell 1</p> <p>How individual RIAs alter the economic impact of regulatory choices</p>	<p>Cell 2</p> <p>How RIA creates demand for administrative capacity</p>	<p>Cell 3</p> <p>How individual RIAs influence the decision-making process</p>
Long term	<p>Cell 4</p> <p>Impact on competitiveness and growth</p>	<p>Cell 5</p> <p>How RIA impacts over time on regulatory cultures and bureaucratic types within agencies</p> <p>How RIA complies (or clashes with) administrative procedure</p>	<p>Cell 6</p> <p>How RIA triggers constitutional reforms to retrofit it to the constitutional order</p> <p>Impact of RIA on the legitimacy of the regulatory state (classic, neo—pluralist, or civic republican versions)</p>

Before we start analyzing types of impact, however, it is important to avoid the common mistake of not controlling for the null hypothesis of ‘no impact’. The literature on policy evaluation has provided extensive evidence that even ambitious innovations have ‘little impact’ on specific decisions, as shown by (Weiss, 1979). This may lead to a different type of research, focused, for example, on why RIA is so poorly implemented in several European countries.

Beyond individual decisions, there are possible long-term effects in the countries that have implemented RIA. Here is where the relationship between impact assessment and the regulatory state becomes salient.

What does the literature say about RIA and the regulatory state? One way to answer (and in the meantime look at what should be done in the future) is to go back to the different logics that explain the adoption of RIA. Does it bring economic rationality to bear on regulatory choices within regulatory agencies? Does it increase executive control of the regulators? Does it foster the emergence of new modes of regulatory governance, arguably a smart, democratic, open regulatory state? Let us recap our points, starting from the rationality theme in regulatory governance. Economists have long discussed whether RIA contributes to the emergence of more efficient regulation. Research on the accuracy of cost estimates and more generally 'the government's numbers' produced in the USA and the UK seem to conclude that regulatory analysis has been less than efficient – the argument being that regulations that should not have passed the net benefit test have been introduced quite frequently. In turn, this happened either because of self-interested under-estimation of costs (bureaucracies want to regulate to increase their power, and adjust cost estimated accordingly), or because the obligation to perform cost-benefit analysis has not been implemented. Yet several empirical studies RIA have produced evidence of over-estimation of regulatory costs.

Note that the work done by economists on the efficiency of RIA is based on the standard documents produced in the impact assessment process. Another way to look at the rationality of RIA is to go beyond the document itself and ask whether resources for analysis are optimized across the life-cycle of policy. A dollar invested in RIA cannot be invested in ex-post policy evaluation – hence the opportunity cost of ex-ante analysis is given by the money that is not invested in ex-post evaluation or in any type of assessment taking place after regulation decisions have been made. Not many authors have explored the opportunity costs or RIA, although there is preliminary evidence that some sort of crowding-out effects is occurring, at least in the UK (see SQW 2005, and Baldwin 2005 on

the excessive RIA-isation of the policy process). Future research should focus more on the political economy of different types of assessments across the life-cycle of policies, rather than looking at RIA in isolation from other ways to conduct policy appraisal.

Another group of authors has debated the effects of a specific type of rationality at work in RIA, that is, cost-benefit analysis. In this connection, an interesting research question is about the long-term impact of RIA as ‘comprehensive economic rationality’ within agencies and, looking at Europe, government departments. One of the most powerful insights provided by McGarity’s concerns the conflict between comprehensive and techno-bureaucratic rationality within US agencies. McGarity showed how agencies were coping with this issue, sometimes by using team models to integrate the two types of rationality, in other cases by using adversarial internal processes to take the benefits of a well-argued defense of different ways to look at regulatory problems and their solutions. It would be useful to extend this research question - now that RIA has been used in the USA for a long period of time - and to compare these results with the findings from other countries. Different administrative traditions, attitudes of the civil servants, decision-making styles provide classic variables to control for. It would also be interesting to know if the clash between techno-bureaucratic approaches and economic rationality is bringing about a new hybrid of Bayesian rationality, in which RIA is combined with more classic techno-bureaucratic assessments to learn from experience in a context of uncertainty.

As mentioned throughout the paper, the most important issues linking RIA and the regulatory state are about political control and the overall impact on constitutional settings. Public choice theorists rightly show that RIA is not a politically neutral device to provide more rational decision-making. Within the APA – ‘the constitution of the regulatory state’ (Croley, 1996) -- it was introduced in the USA to solve classic executive delegation problems. We argued that principal-agent modeling should be supplemented by (a) a theory of negotiation, (b) a thorough understanding of the administrative process, and (c) public

management theory to understand who wins the control game. One may reason that agencies get captured by the regulatees, although empirical evidence is controversial (Kalt & Zupan, 1984). Following Majone (1996), one can submit that being perceived as fair and relatively un-biased in regulatory analysis is essential, and agencies would use RIA for this purpose. Others, following Rosebloom, can submit that overall there has been a decent Congressional and judicial retrofitting of the administrative state, and the constitutional balance is overall preserved – at least in the US. Incidentally, this raises questions about the European RIA architectures, in which there has been almost no discussion of retrofit mechanisms focusing explicitly on RIA.

Finally, central units in charge of oversight have been established in most countries that have adopted RIA. However, whilst in the US the OMB has been accused by its detractors of being interested in employing oversight to preserve the interests of the President, academics and observers have been struck by how poor central quality control is in Europe.⁶ So perhaps there is a symbolic-discursive dimension at work in some European countries, rather than a regulatory state increasing its reach and control via RIA (Radaelli, 2005). These broad, challenging questions explain why comparative research on RIA is essentially an investigation into the changing nature of governance architectures.

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⁶ See Allio, Ballantine, & Hudig, 2004; European Policy Centre (EPC), 2001; European Policy Centre, 2001; R. W. Hahn & Litan, 2004; Mather & Vibert, 2006.

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